SUPREME COURT OF THE UNITED STATES.

No. 183.—October Term, 1928.

Henry Leonard, Petitioner, vs. United States. } On Writ of Certiorari to the Court of Claims.

[February 18, 1929.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on writ of certiorari, granted October 8, 1928, under § 3 (b) of the Act of February 13, 1925, to review a judgment of the Court of Claims, 64 Ct. Cls. 384, denying recovery of additional pay claimed to be due to petitioner as a major in the Marine Corps on the retired list. Petitioner, because of wounds received in battle, was retired on September 30, 1911, when his active service was a little more than thirteen years. He was later, at various times, detailed to active duty, making his total active service, both before and after his retirement, more than seventeen years. His service, both active and retired, amounted to more than twenty-seven years at the time this suit was brought. The question presented is whether the Court of Claims correctly held that the years spent by him in inactive service on the retired list could not be counted in determining the amount of his base or period pay as an officer on the retired list.

The pay and allowances of officers of the Marine Corps, and provisions for their retirement, are in general the same as those of like grades in the Army. R. S. §§ 1612, 1622. Under R. S. § 1274, officers retired from active service are entitled to receive 75% of the pay "of the rank upon which they are retired". Before the Act of June 10, 1922, c. 212, 42 Stat. 625, officers in the Army received pay based upon rank, $2,500 a year in the case of a major, R. S. § 1261, increased to $3,000 by Act of May 11, 1908, c. 163, 35 Stat. 106, 108, and a certain additional amount, termed "longevity pay", based on length of service. R. S. §§ 1262, 1263, and Act of June 30, 1882, c. 254, 22 Stat. 117, 118.

In *United States* v. *Tyler*, 105 U. S. 244, decided in the October term, 1881, this Court held that under the applicable statutes a retired army officer was entitled to count the period during which he had been on the retired list in computing longevity pay. The effect of this decision was modified by the Act of March 2, 1903, c. 975, 32 Stat. 927, 932, which provided that "except in case of officers retired on account of wounds received in battle", officers then or later retired should not receive further increases in longevity pay for retired service. Under these provisions the petitioner was entitled, after his retirement in 1911, to 75% of the base pay of a major, $3,000 a year, and as his retirement was because of wounds received in battle, he was permitted by the Act of 1903 to count his period of retirement in determining the amount of his longevity pay.

By the Act of June 10, 1922,[1] revising generally the scheme of service pay, a new schedule of base and longevity pay was adopted. The amount of base pay was fixed with reference to specified pay periods and was made to depend both upon rank and length of service. Under it majors who had completed fourteen years of service were to receive fourth period pay of $3,000 per annum, and majors of twenty-three years of service fifth period pay of $3,500. It also provided that an officer should receive an increase of 5% of the base pay of his period for each three years of service up to thirty years, with certain limitations not now important.

---

[1] An Act To readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps . . .

Be it enacted . . . That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the Regular Army and Marine Corps below the grade of brigadier general . . . pay periods are prescribed, and the base pay for each is fixed as follows:

. . . . . .

The pay of the fifth period shall be paid to . . . majors of the Army . . . and officers of corresponding grade who have completed twenty-three years' service; . . .

The pay of the fourth period shall be paid to . . . majors of the Army . . . and officers of corresponding grade who have completed fourteen years' service; . . .

. . . . . .

Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years . . . Nothing contained in the first sentence

As this Act, effective July 1, 1922, provided that it should not operate to authorize an increase or decrease in the pay of officers on the retired list on June 30, 1922, the petitioner continued after its enactment, as before, to be entitled to base pay of $3,000 a year as fixed by the Act of May 11, 1908, and to longevity pay as fixed by other applicable provisions of the statutes. But by the Act of May 8, 1926, c. 274, 44 Stat. 417, enacted "to equalize the pay of retired officers", the benefits of the Act of June 10, 1922, were to some extent extended to officers retired on or before June 30, 1922, by providing that the retired pay of such officers should not be less than that provided for "officers . . . of equal rank and length of service retired subsequent to that date."

Petitioner has received longevity pay as a major of twenty-seven years service, his right to which is not contested. He has also received 75% of the base pay for the fourth period as prescribed by the Act of June 10, 1922, for a major of more than fourteen years service. If entitled to base pay calculated on the twenty-seven years of his total active and inactive service, he should receive, under the provisions of the 1926 Act, the benefit of the higher pay of the fifth period, 75% of the difference between this pay and the base pay for the fourth period being the amount involved in the present suit.

It is not denied that petitioner should be allowed to count his entire period of active service, including that since his retirement, of more than seventeen years, which would entitle him to pay of the fourth period which he is now receiving, and it is argued by

---

of Section 17 or in any other section of this Act shall authorize an increase in the pay of officers or warrant officers on the retired list on June 30, 1922.

For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay . . .

. . . . . .

Sec. 17. That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this Act: *Provided*, That nothing contained in this Act shall operate to reduce the present pay of officers . . . now on the retired list . . .

petitioner that the benefits of the Act of June 10, 1922, which by the Act of May 8, 1926 were extended to all retired officers, include, in the case of petitioner, the right to count inactive service in computing base pay. This claim is based on the provision of the Act of March 2, 1903, allowing officers whose retirement was on account of wounds received in battle, as was petitioner's, to count retired service in computing longevity pay and on the clause in the Act of 1922 which provides that "for officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay".

That this latter clause, when enacted, was intended to include only officers then in active service is, we think, apparent on an inspection of the whole 1922 Act. As already noted, the pay of officers on the retired list remained unaffected by this legislation at the time of its enactment. Section 1 expressly stipulated that the act should not authorize any increase in the pay of officers already retired on June 30, 1922, and this provision must be read with the next sentence, save one, on which the petitioner relies. Having by the first clause excluded retired officers from any increase authorized by the act, the later provision for computing the pay of "officers in service" by including all service then counted in computing longevity pay must be taken to have referred only to officers on the active list.

The equalization Act of May 8, 1926, was passed in order to correct certain inequalities in the pay of retired officers, due to the fact that the Act of 1922 was not, by its terms, applicable to officers retired before its effective date, and also to continue the former policy, exemplified by R. S. § 1274, of securing to retired officers proportionate benefits of increased pay legislation affecting officers on the active list. See House Report No. 857, 69th Congress, First Session.

But in carrying out this purpose, the 1926 Act did not strike down the provision of the 1922 Act expressly excluding from its benefits officers then retired and, as so modified, apply it to those officers. Had it done so it would more certainly have secured to officers retired before the effective date of the earlier act the benefit of the clause allowing all service counted in computing longevity pay to be included in the computation of base pay. Instead, by its terms, the Act of 1926 implies a comparison with

an officer benefited by the 1922 Act, that is—so far as the clause of that act in question is concerned—an officer in active service on July 1, 1922.

Even assuming, as petitioner argues, that under the provisions of the 1922 Act, an officer then in active service would be entitled to count prior service while retired on account of wounds received in battle, in computing his base pay, which is not free from doubt,[2] it seems unlikely that Congress, by the equalization Act of 1926, meant to set up as a standard of comparison, a case so exceptional as that of an officer reappointed to active service after being retired, chancing to be engaged in such service on the operative date of the 1922 Act. It is argued by the Government that section 24 of the Act of June 4, 1920, c. 227, 41 Stat. 759, had rendered reappointments from the retired to the active service (as distinguished from temporary assignments of retired officers to active duty, like that of petitioner) practically impossible, except by special act of Congress. The Act is open to such a construction for it limited the number of commissions permitted in each rank, provided that vacancies should be filled from senior active officers of next lower rank and thus seemingly terminated the former practice of permitting appointments to the active service from those on the retired list.

It seems more reasonable to believe that Congress in general legislation of this character contemplated comparison only to a more universal standard—the normal case of an officer continually in active service until his retirement after July 1, 1922, and that consequently the 1926 Act should not be read to extend to officers retired before 1922, the benefits of the clause permitting active officers alone to include all service counted in computing longevity pay. There is nothing in the 1926 Act expressly indicating an intention of Congress to allow to an officer retired in 1911, the same base pay as that given to one who, appointed at the same time, had continued in active service until after the date of the 1922 Act—which is what petitioner contends. Moreover, the construction adopted by us is more in consonance with the policy seemingly expressed in the amendment to the 1922 Act contained in the Act of May 26, 1928, c. 787, 45 Stat. 774, that from and after July 1, 1922, only active service should authorize increases in the base pay.

[2]The compilers of the U. S. Code regarded the Act of 1903 as being repealed and consequently as permitting only active service to be included. See U. S. Code, Tit. 10, Sec. 683.

On the facts presented we need not decide whether officers in active service on June 30, 1922 and retired after that date because of wounds received in battle were entitled to count such subsequent retired service in computing their base pay.

Recognizing the force of petitioner's argument and that the number and complexity of the statutes involved and their inept phrasing leave the question not free from doubt, we conclude that the construction given to them by the Court of Claims is the more reasonable one. The judgment is accordingly

Affirmed.

Mr. Justice McREYNOLDS is of the opinion that the petitioner's claim is within the words of the statutes and should be allowed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[redacted]

[redacted]

[redacted]

[redacted]

No. 183

[redacted]

HENRY LEONARD, PETITIONER,

vs.

THE UNITED STATES

[redacted]

[redacted]

[redacted]

[redacted]

(33,462)

(33,492)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 183

HENRY LEONARD, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Petition for writ of certiorari	1	1
Record from Court of Claims	1	3
Petition	1	3
General traverse	5	6
Argument and submission	5	6
Special findings of fact	6	6
Conclusion of law	7	7
Opinion, Campbell, J	7	8
Judgment	10	11
Proceedings after judgment	10	12
Clerk's certificate (omitted in printing)	11	
Order allowing certiorari		13

[fol. 1]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. —

HENRY LEONARD, Petitioner,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner, Henry Leonard, respectfully represents:

1. He presented his petition to the Court of Claims February 10, 1927, claiming to be paid as a retired Major of the United States Marine Corps from May 8, 1926, to date of filing petition and thereafter continuously by counting all service rendered on both the active and retired lists in computation of his length of service for purposes of pay. The judgment of said court dismissing his petition was rendered January 9, 1928, with an opinion by Mr. Chief Justice Campbell. A motion for new trial was seasonably made within the time required by the rules of said Court of Claims, February 10, 1928, but said court after considering said motion overruled it April 2, 1928, whereby said judgment became final.

2. His claim is based on the act of March 2, 1903 (c. 975, 32 Stat. 927, 932) providing as follows:

"That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increases of longevity pay, and officers hereafter retired, except as [fol. 2] herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement."

Also upon the act of June 10, 1922 (c. 212, 42 Stat. 625) providing pay periods for all officers of the Marine Corps and other military services and providing, among other things, that the pay of the fifth period shall be paid to majors of the Army and officers of corresponding grade who have completed twenty-three years of service.

Also the act of May 8, 1926 (c. 274, 44 Stat. 417) providing that the retired pay of officers of the Marine Corps who were retired on or before June 30, 1922, shall not be less than that provided for officers of equal rank and length of service retired subsequently to that date.

3. Your petitioner has been receiving the base pay of the period provided by law for an officer of fourteen years' service, but the increase of five per centum of the base pay as for an officer of more than twenty-seven years' service.

4. Section 1 of the Joint Service Pay Act of June 10, 1922, (c. 212, 42 Stat. 625) provides "For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longecity pay," etc. Also, "Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years;" (foot p. 626). All previous legislation for computing time toward longevity pay is thus made the basis for counting service for both base or period pay and increase for each three years of service under the new act.

5. A large number of officers of the Army and Marine Corps,—amounting in the case of the Army to 86 officers, [fols. 3 & 4] and in the case of the Marine Corps to approximately 41, also a number of officers of the Navy of whom your petitioner is now unable to give even an approximate number, but which must be quite large—retired on account of wounds received in battle, are affected either as regards their present or future pay, by the decision of this case. All of these officers are of the highly meritorious class of officers retired on account of wounds received in battle who were singled out for specially favorable treatment by the act of March 3, 1903 (c. 975, 32 Stat. 927, 932), hereinbefore quoted. All these officers are now paid as of one length

of service for purposes of base pay and as of another and greater length of service for increase for each three years of service. This is not believed to be in accordance with the intent of Congress. The case is manifestly proper for the consideration of this court as a class case.

George A. King, George R. Shields, Attorneys for Petitioner.

[fols. a & 1] IN THE COURT OF CLAIMS

No. H-52

HENRY LEONARD

v.

THE UNITED STATES

I. PETITION—Filed February 10, 1927

To the Honorable the Court of Claims:

The claimant, Henry Leonard, respectfully represents:

I. The claimant was on the 11th day of June, 1898, appointed and commissioned an officer in the Marine Corps of the United States and served until February 15, 1899, and again from April 10, 1899, to September 30, 1911, when he was retired from active service on account of physical disability consisting of the loss of the left arm at the shoulder joint as a result of wounds received in battle on the 13th day of July, 1900, at Tien-Tsin City, China.

Since his retirement he has performed active service as follows:

October 6, 1911, to November 3, 1911;
February 5, 1912, to April 2, 1912;
December 26, 1912, to March 10, 1913;
June 3, 1913, to July 3, 1913;
April 17, 1917, to March 15, 1921;
November 14, 1925, to April 1, 1926.

His total active service both before and after his retirement amounted to 17 years 11 months and 25 days. He had at [fol. 2] the time of his retirement September 30, 1911, 13

years 1 month and 26 days of active service. Having been retired on account of wounds received in battle all increases, both for longevity and base pay, continued to accrue to him after his retirement by virtue of the statute hereinafter cited.

He had thus attained a total of active service and periods spent on the retired list of more than 27 years, and is entitled to the benefit provided by the statutes hereinafter referred to—the pay, both base and longevity, of a major in the Marine Corps of more than 23 years service.

II. He claimed the right to the Paymaster of the Marine Corps holding his accounts to be paid from and after the 8th day of May, 1926, as a Major in the Marine Corps entitled to the pay of the fifth period, together with all longevity increases accruing up to 27 years of service.

Said Paymaster submitted the question to the Comptroller General of the United States, who held that he was not entitled to the pay of the fifth period, but only to the pay of the third period, with proper longevity increases. His pay of that period was not equal to the pay he was already receiving. Hence it was held that he was not entitled to any benefit from the passage of the act of May 8, 1926, hereinafter referred to.

III. He therefore claims pay as a Major, United States Marine Corps, of the fifth period together with all longevity increases thereon up to those accruing for a period of 27 years, or, if he should pass a total of 30 years' service, both active and retired, before the rendition of judgment hereon, then he claims up to a total of 30 years' service longevity [fol. 3] on said pay of the fifth period. The amount due him to probable date of rendition of judgment hereon amounts to $1,000, more or less, subject to more exact computation by the General Accounting Office.

IV. This claim is based upon and depends upon the following among other statutes:

Revised Statutes, Sections 1261, 1262, 1263, providing rates of pay and increases thereon for all officers of the different ranks of the Army.

Revised Statutes, Sections 1612, 1622, providing the same rates of pay for officers of the Marine Corps and applying the same provisions as to retirement as are provided by law for officers of the Army.

Act of June 30, 1882 (22 Stat. 118), providing that the 10% for length of service shall be computed on the yearly pay of the grade.

Act of March 2, 1903 (32 Stat. 932), providing that except in case of officers retired on account of wounds received in battle no retired officer shall be allowed increase of longevity pay.

Act of June 3, 1916, Sec. 24 (39 Stat. 183), giving any retired officer detailed on active duty the rank, pay and allowances of the grade that he would have attained in due course of promotion.

Act of May 12, 1917 (40 Stat. 48), giving any retired officer detailed to active duty longevity increases for active service after retirement as well as for service on the active list.

Act of June 10, 1922 (42 Stat. 625), providing that majors who have completed 23 years' service shall receive the base pay of the fifth period, $3,500, with corresponding longevity increases thereon, and that all service now counted in computing longevity pay shall be included in the computation.

[fol. 4] Act of May 8, 1926 (44 Stat. 417), equalizing the pay of officers retired on or before June 30, 1922, with that provided for officers retired subsequently to that date.

V. No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims one thousand dollars ($1,000).

King & King, Attorneys for Claimant.

Duly sworn to by Henry Leonard. Jurat omitted in printing.

[fol. 5] II. General Traverse—Filed March. 22, 1927

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

J. G. E.

III. Argument and Submission

On December 8, 1927, this case was argued and submitted on merits by Mr. George A. King, for the plaintiff, and by Mr. William W. Scott, for defendant.

[fol. 6] **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.**—Filed January 9, 1928

This case having been heard by the Court of Claims, the court makes the following

Special Findings of Fact

I

Henry Leonard entered the Marine Corps June 11, 1898, and served as a second lieutenant to February 15, 1899. He reentered the Marine Corps April 10, 1899, as a second lieutenant, and served continuously through intermediate grades until he reached the grade of major, May 13, 1908. He continued to serve from that date as major to September 30, 1911, when he was retired from active service for physical disability consisting in the loss of the left arm at the shoulder joint, the result of wounds received in battle on the 13th of July, 1900.

At the time of his retirement he had had 13 years 1 month and 26 days' service.

Since retirement he has had active duty as follows:

October 6, 1911, to November 3, 1911; February 5, 1912, to April 2, 1912; December 26, 1912, to March 10, 1913;

June 3, 1913, to July 3, 1913; April 17 1917, to March 15, 1921; November 14, 1925, to April 1, 1926.

II

He has had since his retirement a total active service of 4 years 9 months and 29 days. His entire active service before and since his retirement amounts to 17 years 11 months and 25 days up to the first day of April, 1926. The total of the time he has been upon the active and retired lists amounted to 27 years on August 3, 1925. He has been paid from April 8, 1926, the pay of a major of the United States Marine Corps, retired, at the rate of $250 per month, less 20 cents per month hospital fund, which rate represents the maximum pay of a retired major of the United States Marine Corps provided by the act of May 11, 1908, under which act pay was greater than if he had been paid the base pay of a major of less than 14 years' service in [fol. 7] the third pay period prescribed by the act of June 10, 1922, and is the same as the base pay prescribed for a major of the Marine Corps of more than 14 years' service in the fourth pay period. He has also been paid longevity pay as a major of 27 years' service by reason of being retired for wounds.

If paid as a major entitled to credit of 27 years' service, he would receive as a major in the fifth pay period a difference of pay amounting from May 8, 1926, to March 31, 1927, to $723.41.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover and the petition is therefore dismissed.

Judgment is rendered in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Campbell, Chief Justice, delivered the opinion of the court:

This case grows out of the claim of a major in the Marine Corps, retired from active service on account of physical disability, consisting of the loss of his arm as a result of wounds received in battle on July 13, 1900, in China. He was retired on September 30, 1911, and at that time had had 13 years 1 month and 26 days of active service. Since that time he has had active service, amounting to 4 years 9 months and 29 days, making the total of his active service, before and since his retirement, 17 years 11 months and 25 days. The plaintiff's brief states the question as follows: "The principal question in this case is as to the right of an officer of the Marine Corps, retired for wounds received in battle, to be paid, as in the period established by the act of June 10, 1922, to which he would be entitled if his services were counted continuously through the active and retired lists." In other words, in order to ascertain the base pay of a major in the Marine Corps, retired for disability as stated, that the periods of his active service should be added to the periods of inactive service, and since the aggregate of all these exceeds 27 years that he is entitled to the base pay provided in the act of June 10, 1922, 42 Stat. 625, for the fifth pay period. We speak of the base pay of the pay periods, because the act so designates it, prescribing as it does six pay periods "and the base pay for each" of them. It also provides for longevity pay, in sec. 1, as follows: "Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years." The distinction thus made between base pay and longevity pay is not changed by other provisions of the act.

The right of a retired officer to longevity pay was recognized in the Tyler case, 16 C. Cls. 223, the decision being affirmed by the Supreme Court, 105 U. S. 244. Following these decisions the act of March 2, 1903, 32 Stat. 932, was passed which provided "That hereafter, except in cases of [fol. 8] officers retired on account of wounds received in

battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement." It is conceded that this provision cut off longevity increases accruing after retirement except in the single case of "officers retired on account of wounds received in battle," and it is claimed that the plaintiff belongs to this latter class. This condition of the law continued until the act of June 10, 1922, but a provision in that act expressly excluded plaintiff and other retired officers from its benefits, as follows: "Nothing contained in the first sentence of section 17 or in any other section of this act shall authorize an increase in the pay of officers or warrant officers on the retired list on June 30, 1922," or, as stated by his brief, "Thus the new act made no change in the pay of officers already retired." It is therefore to the later act of May 8, 1926, 44 Stat. 417, that we must look. It provides "that hereafter the retired pay of the officers and warrant officers of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service, who were retired on or before June 30, 1922, shall not be less than that provided for the officers and warrant officers of these services of equal rank and length of service, retired subsequent to that date." The reference must therefore be to the provisions of the act of June 10, 1922, for officers and warrant officers retired subsequent to June 30, 1922, since the officer in the instant case is entitled to receive from and after May 8, 1926, not less than the retired pay provided for an officer of equal rank and length of service retired subsequent to that date, with the provision, however, that it shall not "operate to reduce the pay of any officer or warrant officer now on the retired list." The act of June 10, 1922, makes provision for the pay of retired officers, section 17 of the act being as follows:

"Sec. 17. That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this act: Provided, That nothing contained

in this act shall operate to reduce the present pay of officers, warrant officers and enlisted men now on the retired list or officers or warrant officers in an equivalent status of any services mentioned in the title of this act. Active duty performed after June 30, 1922, by an officer on the retired list or its equivalent shall not entitle such officer to promotion: * * * Retired officers of the Army, Navy, Marine Corps, Coast Guard, and Coast and Geodetic Survey below the grade of brigadier general or commodore and retired warrant officers and enlisted men of those services, shall, when on active duty, receive full pay and allowances."

The retired pay is therefore "to be computed as now authorized by law," but on the basis of pay provided by the act. The law had long provided, by section 1274, Revised Statutes, that "officers retired from active service shall receive 75 per centum of the pay of the rank upon which they were retired." The pay of the rank of major upon which this officer was retired was fixed by the act of May 11, 1908, 25 Stat. 106, 108, at $3,000.00 per annum. [fol. 9] In addition he was entitled to longevity pay because of being within the exception already stated in the act of March 2, 1903. The officer was retired with less than 14 years of active service to his credit and would not come within the fourth pay period prescribed by the act of June 10, 1922, unless there be added the additional active service rendered after his retirement. And adding the periods of his active service after retirement to that rendered before his retirement, there results active service for more than 17 years, which would bring the officer into the fourth pay period, the base pay of which is $3,000. We think there can be no doubt that the officer should be credited with all active service, before and after the date of his retirement. See 5 Comp. Gen. 1038. But the contention is that the length of service with which the officer is to be credited is not alone active service but should include the periods while he was on the retired list, though not in active service, and this would bring him within the fifth pay period. To this contention we can not assent. There is nothing in section 17 of the act of June 10, 1922, that sustains it and the provision to be found in section 1 of the act, 42 Stat. 627, that "For officers in the service on June 30, 1922, there

shall be included in the computation all service which is now counted in computing longevity pay" does not refer to or include officers on the retired list. It has reference to officers on the active list. Clearly, when Congress says that nothing contained in the act shall authorize an increase in the pay of officers on the retired list, on June 30, 1922, it can not be supposed that in the next sentence, save one, the Congress was providing a method whereby there would be an increase in the pay of these same officers. To give the quoted language any meaning it must be referred to its context, where the act is dealing with pay of officers in the active service. And when the act of May 8, 1926, is considered, it being the act relied upon as securing to the plaintiff rights conferred by the act of 1922 upon retired officers, it appears that equalization of pay is with officers retired subsequent to June 30, 1922. The retirement thus contemplated is from active service. The act of 1922 prescribes pay periods and base pay for each; also it provides longevity pay for officers in the active service. Aided by the act of May 8, 1926, it regulates the pay of retired officers, but neither act authorizes the retired officer to go from one pay period into another solely because of length of time elapsing since his retirement. The advancement from one pay period to another can be based only on active service. The base pay of the fourth pay period is the same amount as that prescribed by the act of May 11, 1908. The plaintiff is not entitled to the base pay of the fifth pay period, and having been paid as much as an officer retired subsequent to June 30, 1922, and of equal rank and length of service, would receive, the petition should be dismissed. And it is so ordered.

Moss, Judge; Graham, Judge; and Booth, Judge, concur.

[fol. 10] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 9th day January, A. D., 1928, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order and adjudge that

the plaintiff, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered and *and* decreed that the United States shall have and recover of and from the plaintiff the cost of printing the record in this court. No printing having been done no costs are taxed.

VI. Proceedings After Entry of Judgment

On February 10, 1928, the plaintiff filed a motion for a new trial.

On April 2, 1928, the court entered the following order on said motion:

Order

It is ordered by the Court this 2d day of April, 1928, that the plaintiff's motion for new trial be and the same is overruled.

[fol. 11] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 33,492. Court of Claims. Term No. 183. Henry Leonard, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed June 8th, 1928. File No. 33,492.

Supreme Court of the United States

Order Allowing Certiorari—Filed October 8, 1928

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U. S.
FILED
NOV 14 1928
CHARLES LAMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1928.

No. 183.

HENRY LEONARD, *Petitioner,*
v.
THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR PETITIONER.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Petitioner.

TABLE OF CONTENTS.

Jurisdiction of the Court 1
Statement of the Case 1
  Facts 1
  Statutes 2
Assignment of Error 3
Brief of Argument 3
  Summary 3
  Legislation and Decision 4
  "Service Now Counted," Act of 1922 5
  Officers Retired for Wounds Received in Battle 6
  Period and Longevity Pay 9
  Spirit and Intent of the Law 10
Appendix:
  Text of Statutes 12

TABLE OF CASES.

Davison *v.* United States, 43 C. Cls. 308 6
Davison *v.* United States, 16 Comp. Dec. 889 6
Leonard *v.* United States (this case), 64 C. Cls. 384 1
Stewart *v.* United States, 34 C. Cls. 553 6
United States *v.* Morton, 112 U. S. 1 6
United States *v.* Noce, 268 U. S. 613 6
United States *v.* Tyler, 105 U. S. 244 . . . . . 4, 6, 7, 8
United States *v.* Watson, 130 U. S. 30 6

TABLE OF STATUTES CITED.

Revised Statutes:
  Secs. 1261, 1262, 1263, 1274, 1612, 1622 . . . . . 12, 13

Acts of:
  February 24, 1881, c. 79, 21 Stat. 346 6
  June 30, 1882, c. 254, 22 Stat. 117, 118 12
  March 2, 1903, c. 975, 32 Stat. 927, 932 . . . . . 4, 13

May 11, 1908, c. 163, 35 Stat. 106, 108 4
May 13, 1908, c. 166, 35 Stat. 127, 155 4
August 24, 1912, c. 391, 37 Stat. 569, 594 . . . 6
June 10, 1922, c. 212, 42 Stat. 625 13–16
May 8, 1926, c. 274, 44 Stat. 417 . . . . . 5, 16
Code of Laws of the U. S. 1926, Sec. 2, par. (a) . 10, 11

Supreme Court of the United States.

October Term, 1928.

HENRY LEONARD, *Petitioner,*
v.
THE UNITED STATES. } No. 183.

64 C. Cls. 384.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR PETITIONER.

Jurisdiction of the Court.

The judgment to be reviewed was rendered January 9, 1928, and dismissed the petition. The opinion was delivered by Chief Justice Campbell (R. 8–11), reported 64 C. Cls. 384. A motion for new trial was seasonably made February 10, 1928, and overruled April 2, 1928 (R. 12). The petition for writ of certiorari was filed June 8, 1928, and was granted by this court October 8, 1928.

STATEMENT OF THE CASE.

Facts.

The claim is that of a major, Marine Corps, retired from active service September 30, 1911, for physical disability consisting of the loss of the left arm at the shoulder joint, the result of wounds received in battle

July 13, 1900, to receive pay from May 8, 1926, on the retired list by continuously counting all service since retirement as well as before toward the pay period in which he shall be paid.

At the time of his retirement he had had 13 years, 1 month and 26 days service. Since his retirement he has been on active duty for a period of 4 years, 9 months and 29 days. His entire active service before and since his retirement amounts to 17 years, 11 months and 25 days up to April 1, 1926. His total time on the active and retired lists amounted to 27 years on August 3, 1925 (Findings, R. 6, 7).

The determinative act is that of March 2, 1903 (*post*, pp. 4, 13), giving preference to officers retired on account of wounds received in battle.

The question is whether an officer retired on account of wounds received in battle is entitled to count all service on the retired as well as on the active list, and whether in an active or inactive status on the retired list, in order to bring him into a higher pay period under the act of 1922. If he is entitled so to count, he is entitled to judgment for the amount claimed.

He is being paid as stated in the following paragraphs of Finding II (R. 7):

"He has been paid longevity pay as a major of 27 years' service by reason of being retired for wounds.

"If paid as a major entitled to credit of 27 years' service, he would receive as a major in the fifth pay period a difference of pay amounting from May 8, 1926, to March 31, 1927, to $723.41."

Statutes.

The statutes on which this claim depends are as follows:

Revised Statutes, Section 1261, 1262 (as amended by the act of June 30, 1882, c. 254, 22 Stat. 117, 118), 1263, 1274, 1612, and 1622 (*post*, p. 12).

Act of March 2, 1903, c. 975, 32 Stat. 927, 932 (*post*, p. 13).

Act of June 10, 1922, c. 212, 42 Stat. 625, 626, 627, 632, 633 (*post*, pp. 12–16).

Act of May 8, 1926, c. 274, 44 Stat. 417 (*post*, p. 16).

Assignment of Error.

The petitioner assigns as error in the judgment of the Court of Claims that it does not allow him the benefit of his service since retirement in order to bring him into the fifth pay period allowable "to majors of the Army * * * and officers of corresponding grade who have completed twenty-three years' service," and that judgment was not rendered in his favor for the sum due him as an officer entitled to the pay of the fifth pay period.

BRIEF OF ARGUMENT.

Summary.

The act of 1903 gives longevity pay accruing after retirement to "officers retired on account of wounds received in battle." The act of 1922 gives pay by periods dependent in part on length of service. For officers already in the service "there shall be included in the computation all service which is now counted in computing longevity pay." Service after retirement even in an inactive status being allowable under existing laws for computing longevity pay, that service is allowable to an officer retired for wounds for all purposes of computing his pay.

Legislation and Decision.

By Revised Statutes, Sections 1261, 1262, 1263, certain rates of pay were fixed for officers of each grade of rank in the Army, with an increase of ten per cent for each five years' service.

By Revised Statutes, Sections 1612, 1622, officers of the Marine Corps are to receive the same pay and allowances as those of the Army and are to be retired in the same manner.

By act of May 11, 1908, c. 163, 35 Stat. 106, 108 (recognized as applicable to the Marine Corps by the appropriation act of May 13, 1908, c. 166, 35 Stat. 127, 155) rates of pay were increased but without any difference in the mode of computation.

In *United States* v. *Tyler*, 105 U. S. 244, this court held that the "service" on which the ten per cent increase was to be computed was not only service on the active list, but service in an inactive status after retirement.

To overcome the effect of that decision in all but the most highly meritorious cases, Congress made the following provision March 2, 1903, c. 975, 32 Stat. 932 (*post*, p. 13):

"That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement."

This provision cut off longevity increases accruing to officers after their retirement except in the single case of "officers retired on account of wounds received in battle." This officer belongs to that class.

Thus matters continued until June 10, 1922, when Congress by the Joint Service Pay Act, c. 212, 42 Stat. 625, adopted a new scheme of pay periods based upon a combination of rank and length of service. By this act "The pay of the fifth period" [$3,500] "shall be paid * * * to majors * * * who have completed twenty-three years' service * * *." "The pay of the fourth period" [$3,000] "shall be paid * * * to majors * * * who have completed fourteen years' service." "The pay of the third period" [$2,400] "shall be paid to majors * * * not entitled to the pay of the fourth, fifth or sixth period." An increase of five per cent of the base pay is added for each three years' service up to thirty years.

"For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay," etc.

By Sec. 17 of the Joint Service Pay Act of 1922 (*post*, pp. 15, 16) retired officers are to have their retired pay computed on the basis of pay provided in that act.

By provision, however, of the 1st section (*post*, p. 15) nothing was to authorize increase in the pay of officers already on the retired list on June 30, 1922.

By subsequent act of May 8, 1926 (*post*, p. 16), this restriction on the pay of officers already retired June 30, 1922, was removed, and it was provided that they were to have the same pay as officers retired after that date. This act cancels the restriction on pay of officers already retired made in the act of 1922, and requires the pay of all retired officers to be calculated from May 8, 1926, on the basis of pay provided by the act of 1922.

"Service Now Counted," Act of 1922.

By a provision of the first section (*post*, p. 15) "For officers in the service on June 30, 1922, there shall be

included in the computation all service which is now counted in computing longevity pay," etc.

The service counted at the time of the passage of the act of 1922 was defined by the act of February 24, 1881, c. 79, 21 Stat. 346: "and the actual time of service in the Army or Navy or both shall be allowed all officers in computing their pay."

As such service there was counted not only active service as a commissioned officer, but the following in addition:

Service as a cadet at the Military Academy, West Point (*United States* v. *Morton*, 112 U. S. 1, *United States* v. *Watson*, 130 U. S. 30), until the right to count such service was cut off as to those thereafter entering the academy by the act of August 24, 1912, c. 391, Sec. 6, 37 Stat. 569, 594, as decided in *United States* v. *Noce*, 268 U. S. 613.

Service as an enlisted man in the Regular Army, *Stewart* v. *United States*, 34 C. Cls. 553, findings of fact and conclusion of law printed only in 16 Comp. Dec. 889, 890; *Davison* v. *United States*, 43 C. Cls. 308.

Service on the retired list even while inactive as decided in *United States* v. *Tyler*, 105 U. S. 244, until that was cut off by statute as to all officers retired for any cause but wounds received in battle by act of March 2, 1903, c. 975, 32 Stat. 932, *ante*, p. 4, *post*, p. 13.

Officers Retired for Wounds Received in Battle.

As a part of the service "now counted in computing longevity pay" the act of 1903 allowed officers retired on account of wounds received in battle to go on counting their service after retirement, even though in a status of inactivity.

Thus by express provision an officer like the present retired for wounds received in battle is entitled to go on counting his service after retirement.

Finding II (R. 7) shows that the officer receives "longevity pay as a major of 27 years' service by reason of being retired for wounds." The benefit of the same service is, however, refused to him in the computation of his base or period pay on the following ground (Opinion, R. 10, 11):

"There is nothing in Section 17 of the act of June 10, 1922, that sustains it and the provision to be found in Section 1 of the act, 42 Stat. 627, that 'For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay' does not refer to or include officers on the retired list. It has reference to officers on the active list."

This court decided the contrary in *United States* v. *Tyler*, 105 U. S. 244, where the court said as to officers retired from active service (p. 245):

"The question is, therefore, whether an officer thus situated is in the service within the meaning of section 1262. That section allows an increase of pay for every five years' service. When the service ends, there can be no increase on that account. As long as the service continues, the increased pay applies whenever it amounts to five years.

"The law under which these officers are retired does not require their consent, nor does it require that the order for their retirement shall be based upon any absolute incapacity for further service. It may be based upon age, which, being fixed at a minimum of sixty-two years, by no means implies such incapacity. It may be based upon wounds received in battle, but the person retired for this cause may, for many purposes, be a very useful officer.

"The provisions of the statutes, and the uniform treatment of these officers, conform to this view, and necessarily imply that, while not required to perform full service, they are a part of the army, and may be assigned to such duty as the laws and regulations permit."

The following conclusion was reached (p. 246):

"It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial, from the service in disgrace, are still *not* in the military service.

"If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the army of the United States. And if, because they were not required to do full service thereafter, their compensation was diminished by the statute twenty-five per cent, that is no reason why the accounting officers should add a further limitation of pay not found in any statute.

"We are of opinion that retired officers are in the military service of the government, and that the increased pay of ten per cent for each five years' service applies to the years so passed in the service after retirement as well as before."

Congress subsequently to this decision interposed by the act of March 2, 1903 (*ante*, p. 4, and *post*, p. 13), to draw a distinction between an officer retired for age or disease and one retired for wounds received in battle. That act provided that longevity increases

should go on after retirement as decided by this court in the *Tyler* case only where the officers were retired for wounds received in battle. All other officers ceased to earn longevity increases after their retirement.

At the time of the enactment of the act of 1903 the only kind of pay affected by length of service was the addition of 10 per cent for every five years' service. The new act of June 10, 1922 (*post*, pp. 12–16), provided a new scheme of pay. It made all service now counted in computing longevity pay applicable to the computation of all the pay periods provided by that act as well as of the five per cent increase for each three years of service allowed thereby.

At present this officer is being paid in the anomalous status of an officer of *twenty-seven* years' service for computing his 5 per cent increase for each three years' service, but of only *fourteen* years' service in computing his base or period pay. Plainly an officer can not be of one length of service for counting one item of his pay and of another and different length of service for counting another item.

No Distinction Between Period Pay and Longevity Pay.

The act of March 2, 1903 (*ante*, p. 4; *post*, p. 13), refers to "longevity pay" and provides that only officers retired on account of wounds received in battle shall continue to receive any increase of it after retirement.

The act of 1922 (*post*, p. 15) in requiring that "there shall be included in the computation all service which is now counted in computing longevity pay" plainly applied existing statutes regulating longevity pay both for counting the length of service required for a particular period and for computing the 5 per cent for each three years of service provided for by that act.

This officer claims the benefit of twenty-three years' service to put him into the fifth pay period as a major who has completed twenty-three years' service. As all service allowed by previously existing law for computing longevity pay is to be counted in the computation for all purposes under the act of 1922, this plainly brings this officer into the fifth period as a major of more than twenty-three years' service.

Spirit and Intent of the Law.

It is, however, when the whole spirit and intent of the law is looked at that this claim is presented in its strongest light.

This court decided in the *Tyler* case in 1882, that service went on for longevity pay purposes after retirement as well as before. Congress allowed that decision to remain in force for 21 years. In 1903 the law was changed for the future by confining such increase to "officers retired on account of wounds received in battle." No subsequent enactment has departed from that policy. True, the Solicitor General has pointed out in his brief in response to our petition for certiorari that this act of 1903 is not included in the new United States Code of 1926. That Code is, however, not a new enactment as was the Revised Statutes. On the contrary, it is provided, Code, Sec. 2, par. (a):

"The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of

this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments."

Those like the present officer who have been maimed in the service of their country should receive the benefits of their service after retirement as well as before, as required by the act of 1903.

The incongruity of paying this officer an increase of 5 per cent for each three years' service up to twenty-seven years and at the same time allowing him for purpose of base or period pay less than twenty-three years' service should be corrected.

When this case is tested by the acts of 1903, 1922, and 1926, this officer must be held to be for all purposes entitled to count his service after retirement as well as before, and while in an inactive as well as in an active status.

The judgment of the Court of Claims should be reversed.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Petitioner.

APPENDIX.

Text of Statutes.

Revised Statutes:

Sec. 1261. The officers of the Army shall be entitled to the pay herein stated after their respective designations: * * *

Major: $2,500 a year. * * *

Sec. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service.

Sec. 1263. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law.

Sec. 1274. Officers retired from active service shall receive 75 per centum of the pay of the rank upon which they are retired.

Act of June 30, 1882, c. 254, 22 Stat. 117, 118:

An Act Making appropriations for the support of the Army for the fiscal year ending June 30, 1883, and for other purposes.

Be it enacted, etc., * * * That from and after the first day of July, 1882, the ten per centum increase for length of service allowed to certain officers by Section 1262 of the Revised Statutes shall be computed on the yearly pay of the grade fixed by Sections 1261 and 1274 of the Revised Statutes: * * *

Sec. 1612. The officers of the Marine Corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for re-enlisting, as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the infantry of the Army.

Sec. 1622. The commissioned officers of the Marine Corps shall be retired in like cases, in the same manner, and with the same relative conditions, in all respects,

as are provided for officers of the Army, except as is otherwise provided in the next section.

Act of March 2, 1903, c. 975, 32 Stat. 927, 932:

"An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1904.

Be it enacted, etc., * * * That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement.

Act of June 10, 1922, c. 212, 42 Stat. 625:

An Act To readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service.

Be it enacted, etc., That beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the Regular Army and Marine Corps below the grade of brigadier general, of the Navy below the grade of rear admiral, of the Coast Guard, of the Coast and Geodetic Survey and of the Public Health Service below the grade of surgeon general, pay periods are prescribed, and the base pay for each is fixed as follows:

The first period, $1,500; the second period, $2,000; the third period, $2,400; the fourth period, $3,000; the fifth period, $3,500; and the sixth period, $4,000.

* * * * * * * *

The pay of the fifth period shall be paid to colonels of the Army, captains of the Navy, and officers of corresponding grade who are not entitled to the pay of the sixth period; to lieutenant colonels of the Army, commanders of the Navy, and officers of corresponding grade who have completed twenty years' service, or whose first appointment in the permanent service was

in a grade above that corresponding to captain in the Army, or who were appointed to the Regular Army under the provisions of the first sentence of said section 24; to officers of the Staff Corps of the Navy advanced by selection under existing laws to the rank or pay of commander; and to majors of the Army, lieutenant commanders of the Navy, and officers of corresponding grade who have completed twenty-three years' service: *Provided*, That lieutenant commanders of the Staff Corps of the Navy who were appointed between the dates of March 4, 1913, and June 7, 1916, in a grade above that of ensign, shall receive the pay of this pay period after completing twenty years' service.

The pay of the fourth period shall be paid to lieutenant colonels of the Army, commanders of the Navy, and officers of corresponding grade who are not entitled to the pay of the fifth or sixth period; to majors of the Army, lieutenant commanders of the Navy, and officers of corresponding grade who have completed fourteen years' service, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army, or who were appointed to the Regular Army under the provisions of the first sentence of said section 24; to captains of the Army, lieutenants of the Navy, and officers of corresponding grade who have completed seventeen years' service, except those whose promotion is limited by law to this grade and who are not entitled under existing law to the pay and allowances of a higher grade; and to lieutenants of the Staff Corps of the Navy, and lieutenants and lieutenants (junior grade) of the line and Engineer Corps of the Coast Guard whose total commissioned service equals that of lieutenant commanders of the line of the Navy drawing the pay of this period.

* * * * * * * *

Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years: *Provided*, That the base pay plus pay for length of service of no officer below the grade of colonel of the Army, captain of the Navy, or corre-

sponding grade, shall exceed $5,750. Nothing contained in the first sentence of Section 17 or in any other section of this Act shall authorize an increase in the pay of officers or warrant officers on the retired list on June 30, 1922.

For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay, and service as a contract surgeon serving full time; and also 75 per centum of all other periods of time during which they have held commissions as officers of the Organized Militia between January 21, 1903, and July 1, 1916, or of the National Guard, the Naval Militia, or the National Naval Volunteers since June 3, 1916, and service as a contract surgeon serving full time, shall be included in the computation.

* * * * * * * * *

Sec. 16. That nothing contained in this Act shall operate to reduce the pay of any officer on the active list below the pay to which he is entitled by reason of his grade and length of service on June 30, 1922, not including additional pay authorized by the Act entitled "An Act to increase the efficiency of the commissioned and enlisted personnel of the Army, Navy, and Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service," approved May 18, 1920; and nothing contained in this Act shall operate to reduce the total of the pay and allowances which any enlisted man of the Army, Navy, Marine Corps, or Coast Guard is now receiving during his current enlistment and while he holds his present grade or rating.

* * * * * * * * *

Sec. 17. That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by

law on the basis of pay provided in this Act: *Provided*, That nothing contained in this Act shall operate to reduce the present pay of officers, warrant officers, and enlisted men now on the retired list or officers or warrant officers in an equivalent status of any of the services mentioned in the title of this Act. Active duty performed after June 30, 1922, by an officer on the retired list or its equivalent shall not entitle such officer to promotion: * * * Retired officers of the Army, Navy, Marine Corps, Coast Guard, and Coast and Geodetic Survey below the grade of brigadier general or commodore and retired warrant officers and enlisted men of those services, shall, when on active duty, receive full pay and allowances.

* * * * * * * * * *

Sec. 22. That the provisions of this Act shall be effective beginning July 1, 1922, and all laws and parts of laws which are inconsistent herewith or in conflict with the provisions hereof are hereby repealed as of that date.

Act of May 8, 1926, c. 274, 44 Stat. 417:

An Act to equalize the pay of retired officers of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service.

Be it enacted, etc., That hereafter the retired pay of the officers and warrant officers of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service, who were retired on or before June 30, 1922, shall not be less than that provided for the officers and warrant officers of these services of equal rank and length of service retired subsequent to that date: *Provided*, That nothing in this Act shall operate to reduce the pay of any officer or warrant officer now on the retired list.

Sec. 2. That all Acts or parts of Acts inconsistent with this Act are hereby repealed.

Office Supreme Court,
FILED
SEP 4 192
CHARLES ELMORE C
C

IN THE

Supreme Court of the United States.

October Term, 1928.

HENRY LEONARD, *Petitioner*,
v.
THE UNITED STATES. } No. 183.

On Petition for Writ of Certiorari to the Court of Claims.

BRIEF FOR PETITIONER IN REPLY.

From the record and briefs it clearly appears:

1. The question is a debatable one on the construction of the statutes involved (Brief for United States, Conclusion, p. 13).

2. It affects the pay, past, present and future, of 86 officers of the Army, 41 of the Marine Corps, and many of the Navy. This makes more than 100, probably nearer 200 (Brief for petitioner, pp. 6, 7). It is thus a class case of importance.

3. The officers concerned are of the most highly meritorious class (Brief for United States, middle p. 12). They are those "retired on account of wounds received in battle" (Act March 2, 1903, c. 975, 32 Stat. 932, brief for petitioner, top p. 3). No others are affected by the decision.

4. All the conditions thus justify review by certiorari.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Petitioner.

Office Supreme Court, U. S.
FILED
JUN 26 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

October Term, 1928.

No. 183.

HENRY LEONARD, *Petitioner*,

v.

THE UNITED STATES.

Brief in Support of Petition for Writ of Certiorari to the Court of Claims.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Petitioner.

TABLE OF CONTENTS.

	PAGE.
Statement of the Case	1
Legislation and Decision	2
What Service Counts for Base or Period Pay?	4
A Class Case Involving Numerous Officers	6

STATUTES CITED.

Revised Statutes:	
Sections 1261, 1262, 1263	2
Sections 1612, 1622	2
Act March 2, 1903 (c. 975, 32 Stat. 932)	3
Act June 10, 1922 (c. 212, 42 Stat. 625)	3
Act May 8, 1926 (c. 274, 44 Stat. 417)	2

DECISION CITED.

United States v. *Tyler*, 105 U. S. 244, 245, 246	2

IN THE

Supreme Court of the United States

October Term, 1928.

HENRY LEONARD, *Petitioner*,
v.
THE UNITED STATES. } No. 183.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

STATEMENT OF THE CASE.

This is a claim of an officer, United States Marine Corps, on the retired list, his retirement being for wounds received in battle.

His claim is to be paid as a retired major from May 8, 1926, to date of filing his petition and continuously thereafter by counting all service rendered on both the active and retired lists in computation of his length of service for purposes of pay. He is being paid (Finding II, R. 7):

"the same as the base pay prescribed for a major of the Marine Corps of more than 14 years' service in the fourth pay period. He has also been paid longevity pay as a major of 27 years' service by reason of being retired for wounds.

"If paid as a major entitled to credit of 27 years'

service, he would receive as a major in the fifth pay period a difference of pay amounting from May 8, 1926, to March 31, 1927, to $723.41."

His claim is for the recovery of the last named sum as the pay due a major in the fifth pay period. What is meant by the term "pay period" will appear by an examination of the act of June 10, 1922 (c. 212, 42 Stat. 625), hereinafter quoted.

The act of June 10, 1922, by the provisions of its 1st and 17th Sections excluded officers already on the retired list from any change of pay by virtue of its provisions. This restriction was removed by the act of May 8, 1926 (c. 274, 44 Stat. 417), as stated in the opinion of the Court of Claims (R. 9). The discrimination against officers already retired created by the act of June 10, 1922, was thus cancelled by that of May 8, 1926, so that from that date the case is to be determined entirely by the act of June 10, 1922.

LEGISLATION AND DECISION.

By Revised Statutes, Sections 1261, 1262, 1263, certain rates of pay were fixed for officers of each grade or rank in the Army with an increase of ten per cent for each five years' service.

By Revised Statutes, Sections 1612, 1622, officers of the Marine Corps are to receive the same pay and allowances as those of the Army and are to be retired in the same manner.

This court in *United States* v. *Tyler*, 105 U. S. 244, held that the "service" on which the ten per cent increase was to be computed was not only service on the active list but service in an inactive status after retirement.

To overcome the effect of that decision in all but the most highly meritorious cases, Congress made the following provision March 2, 1903 (c. 975, 32 Stat. 932):

"That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement."

This provision cut off longevity increases accruing to officers after their retirement except in the single case of "officers retired on account of wounds received in battle." This officer belongs to that class.

Thus matters continued until June 10, 1922, when Congress by the Joint Service Pay Act (c. 212, 42 Stat. 625) adopted a new scheme of pay periods based upon a combination of rank and length of service. By this act "The pay of the fifth period ($3,500) shall be paid * * * to majors * * * who have completed twenty-three years' service * * *." "The pay of the fourth period ($3,000) shall be paid * * * to majors * * * who have completed fourteen years' service." "The pay of the third period ($2,400) shall be paid to majors * * * not entitled to the pay of the fourth, fifth, or sixth period." An increase of five per cent of the base pay is added for each three years' service up to thirty years.

"For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay," etc.

WHAT SERVICE COUNTS FOR BASE OR PERIOD PAY?

Finding II (R. 7) shows that the officer receives "longevity pay as a major of 27 years' service by reason of being retired for wounds." The benefit of the same service is, however, refused to him in the computation of his base or period pay on the following ground (Opinion, R. 10, 11):

"There is nothing in Section 17 of the act of June 10, 1922, that sustains it and the provision to be found in Section 1 of the act, 42 Stat. 627, that 'For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay' does not refer to or include officers on the retired list. It has reference to officers on the active list."

This court decided to the contrary of that proposition in *United States* v. *Tyler*, 105 U. S. 244, where the court said, as to officers retired from active service (p. 245):

"The question is, therefore, whether an officer thus situated is in the service within the meaning of section 1262. That section allows an increase of pay for every five years' service. When the service ends, there can be no increase on that account. As long as the service continues, the increased pay applies whenever it amounts to five years.

"The law under which these officers are retired does not require their consent, nor does it require that the order for their retirement shall be based upon any absolute incapacity for further service. It may be based upon age, which, being fixed at a minimum of sixty-two years, by no means implies such incapacity. It may be based upon wounds received in battle, but the person retired for this cause may, for many purposes, be a very useful officer.

"The provisions of the statutes, and the uniform treatment of these officers, conform to this view, and necessarily imply that, while not required to perform full service, they are a part of the army, and may be assigned to such duty as the laws and regulations permit."

The following conclusion was reached (p. 246):

"It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial, from the service in disgrace, are still *not* in the military service.

"If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the army of the United States. And if, because they were not required to do full service thereafter, their compensation was diminished by the statute twenty-five per cent, that is no reason why the accounting officers should add a further limitation of pay not found in any statute.

"We are of opinion that retired officers are in the military service of the government, and that the increased pay of ten per cent for each five years' service applies to the years so passed in the service after retirement as well as before."

Congress subsequently to this decision interposed by the act of March 2, 1903 (*ante*, p. 3), to draw a distinction between an officer retired for age or disease and one retired for wounds received in battle. That act provided that longevity increases should go on

after retirement as decided by this court in the *Tyler* case only where the officers were retired for wounds received in battle. All other officers ceased to earn longevity increases after their retirement.

At the time of the enactment of the act of 1903 the only kind of pay affected by length of service was the addition of 10 per cent for every five years' service. The new act of June 10, 1922 (*ante*, p. 3), provided a new scheme of pay. It made all service now counted in computing longevity pay applicable to the computation of all the pay periods provided by that act as well as of the five per cent increase for each three years of service allowed thereby.

At present this officer is being paid in the anomalous status of an officer of *twenty-seven* years' service for computing his 5 per cent increase for each three years' service, but of only *fourteen* years' service in computing his base or period pay. Plainly an officer can not be of one length of service for counting one item of his pay and of another and different length of service for counting another item.

A CLASS CASE INVOLVING NUMEROUS OFFICERS.

The published Army Register shows the cause of retirement of all officers. An actual count of the names in the Register for 1928 shows a total of 86 officers retired for wounds received in battle.

The Navy Register, which contains the names of officers of the Navy and Marine Corps, shows the officers retired for disability incurred in line of duty, but does not discriminate between those retired for disease and those retired for wounds received in battle.

We are informed that there are at least 41 officers of

the Marine Corps retired like the petitioner for wounds received in battle. The number of officers of the Navy retired for that cause must be much larger. The Solicitor General will probably be in a position to state in his brief in response to this petition, on information which can be obtained from the Navy Department, how many officers of the Navy and Marine Corps, respectively, are on the retired list for wounds received in battle, and whose pay, present or future, will be affected by the decision of this case.

The existence of this large number of officers of a highly meritorious class whose rights will be affected by a decision of the present case affords a conclusive reason for the granting of a writ of certiorari to bring the question before this court on its merits.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Petitioner.

INDEX

	Page
Opinion below	1
Jurisdiction	1
The question	2
The statutes	2
Statement	4
Argument	6
Conclusion	13

CITATIONS

United States v. *Tyler*, 105 U. S. 244	4
Statutes, etc.:	
Act of March 2, 1903, c. 975, 32 Stat. 932	5
Act of May 11, 1908, c. 163, 35 Stat. 106, 108	4
Act of June 10, 1922, c. 212 (Readjustment of Pay Act), 42 Stat. 625—	
Sec. 1	3
Sec. 17	3
Act of February 13, 1925 (Judicial Code), 43 Stat. 936, 939	1
Act of May 8, 1926, c. 274 (Equalization Act), 44 Stat. 417	4
Act of May 26, 1928, Public No. 551	10
R. S. 1282 (Longevity Statute)	4
R. S. 1274 (Retired Pay Statute)	4
U. S. C. Title 10, sec. 683	11, 12
House Report, No. 857, 69th Cong., 1st Sess.	7

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 183

HENRY LEONARD, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 8) has not been reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 9, 1928. (R. 11.) A motion for a new trial was seasonably made and overruled April 2, 1928. (R. 12.) The petition for certiorari was filed on June 8, 1928. (R. 12.) Jurisdiction to issue the writ is found in Section 3 (b) of the Act of February 13, 1925.

THE QUESTION

Petitioner, a major in the Marine Corps, was retired on September 30, 1911, because of wounds received in battle.

The question presented is whether his retirement pay should now be based upon the pay of a major at the time of his retirement plus longevity pay for the time since elapsed, as claimed by the Government and found by the court below; or

Whether it should be based upon the pay to which he would have become entitled under the Act of June 10, 1922, c. 212, 42 Stat. 625, had he remained continuously in active service and been retired after the passage of that Act.

The answer to that question depends upon the proper construction of that Act in connection with the Equalization Act of May 8, 1926, c. 274, 44 Stat. 417.

THE STATUTES

The Act of June 10, 1922, c. 212, 42 Stat. 625, provides pay periods for officers, and for an officer with the rank of major the base pay of these periods, so far as material, is:

Third period, $2,400 for less than 14 years' service.

Fourth period, $3,000 for more than 14 years' and less than 23 years' service.

Fifth period, $3,500 for more than 23 years' service.

Section 1 of the Act provides (p. 626):

> Nothing contained in the first sentence of section 17 or in any other section of this Act shall authorize an increase in the pay of officers or warrant officers on the retired list on June 30, 1922.
>
> For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay * * *.

Section 17 provides (p. 632):

> That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this Act: *Provided*, That nothing contained in this Act shall operate to reduce the present pay of officers * * *. Active duty performed after June 30, 1922, by an officer on the retired list or its equivalent shall not entitle such officer to promotion: * * * Retired officers of the Army, Navy, Marine Corps, Coast Guard, and Coast and Geodetic Survey below the grade of brigadier general or commodore and retired officers and enlisted men of those services, shall, when on active duty, receive full pay and allowances.

The Act of May 8, 1926, c. 274, 44 Stat. 417, provides that the retired pay of officers who were retired on or before June 30, 1922—

> shall not be less than that provided for the officers and warrant officers of these services of equal rank and length of service retired subsequent to that date: *Provided*, That nothing in this Act shall operate to reduce the pay of any officer or warrant officer now on the retired list.

STATEMENT

The petitioner was retired on September 30, 1911, on account of wounds received in battle. He was a major and at that time had 13 years, one month and 26 days of service to his credit. Thereafter, from time to time, he was assigned to active duty aggregating 4 years, 9 months and 21 days, so that on the 1st day of April, 1926, his entire active service had been 17 years, 11 months and 25 days. (R. 7.) At the time of his retirement the pay of a major was $3,000 a year (Act of May 11, 1908, c. 163, 35 Stat. 106, 108), and he was entitled as a retired officer to be paid 75 per cent of the pay of the rank upon which he retired. (R. S. 1274.) As the years went by this was increased 10 per cent for each five years of service. (R. S. 1262, the Longevity Statute.) This Court had held (*United States* v. *Tyler*, 105 U. S. 244) that under that section there was no distinction between active service and service on the retired list, and while Congress nullified that decision with respect to future longevity increases generally, it continued them for

officers retired on account of wounds received in battle (Act of March 2, 1903, c. 975, 32 Stat. 932), and Major Leonard belonged to that class.

The Act of June 10, 1922, *supra,* made no change in his pay, for section 1 said that nothing contained in the Act should authorize an increase in the pay of officers then on the retired list, and Section 17 said that nothing contained in the Act should operate to reduce it. No question arose until the passage of the Act of May 8, 1926, *supra.*

That Act required that his retired pay should not be less than that provided for officers "of equal rank and length of service retired subsequent to" the Act of 1922. When the Act of 1922 was passed he had to his credit over 17 years of active service (R. 6, 7) and over 23 years' service active and retired (R. 7). When the Act of 1926 was passed he had to his credit nearly 18 years of active service and over 27 years of combined active and retired service. His claim is that if he had been retired subsequent to the Act of 1922 his base pay since May 8, 1926, would have been $3,500 a year, that of an officer in the fifth pay period of more than 23 years' service. He has actually been paid during this period at the rate of $250 per month, representing the maximum pay of a retired major under the Act of May 11, 1908, which was *greater* than if he had been paid the base pay of a major of less than 14 years' service in the third pay period under the Act of June 10, 1922, and is the *same* as the base pay prescribed by that Act for a major of more

than 14 years' service in the fourth period. He has also been paid longevity pay as a major of 27 years' service by reason of being retired for wounds. (R. 7.)

If paid as a major entitled to credit for 27 years' service as a major in the fifth pay period, the difference from May 8, 1926, to March 31, 1927, would be $723.41.

ARGUMENT

The question involved is a narrow one and in its last analysis comes down to this: Did Congress by the Act of May 8, 1926, intend that an officer who had been on the retired list for many years should thereafter receive the same pay as he would have received had he spent those same years on the active list and then been retired under the Act of 1922? The Act does not justify such a construction.

The purpose of the Act of May 8, 1926, was to repeal that portion of Section 1 of the Act of June 10, 1922, which provided that nothing contained in that Act should authorize an increase in the pay of officers on the retired list on June 30, 1922. That provision represented a departure from the long continued policy of Congress to give officers upon the retired list the benefit of any legislation increasing the pay of officers of the rank held by retired officers at the time of their retirement. This is pointed out in the Report of the House Committee on Military Affairs recommending the passage of the Bill S. 1786, which became the

Act of May 8, 1926. (House Report No. 857, 69th Congress, 1st Session.) That report sets forth in full House Report No. 186 of the same Congress and session upon a House Bill which was identical with the Senate Bill which finally became law. The Report, referring to Section 1274 of the Revised Statutes, says:

> From this it will be noted that the pay of retired officers is not a fixed sum nor is it a specified sum, but it is seventy-five per cent of the pay of the rank upon which they are retired; that is, three-fourths of the pay of officers of similar rank still on the active list and not three-fourths of the pay of the date at retirement.

The Report then traces legislation beginning with the Act of March 2, 1867, and points out that originally provision had been made in Section 17 of the Act of June 10, 1922, for the equality of treatment of all retired officers regardless of the date of their retirement, thus adhering to the principle laid down in the Act of 1870, but explains that in conference a limitation was inserted which deprived all officers on the retired list of any benefit they might have received from the revised schedule. The Report mentions several instances in which unjust discrimination has resulted. One comparison is between a colonel retired in 1921 and another retired in 1922. The first officer's service was 30 per cent longer than the second, but the second officer's retired pay was 20 per cent greater than the first. The Report also contains a letter

from the Secretary of War recommending the passage of the Bill.

It seems clear that the purpose of the Act was to prevent such discrepancies by securing to an officer retired prior to June 30, 1922, the same pay to which he would have been entitled had he been retired thereafter, based upon the service which the statute said should then be computed in fixing the pay of an officer then retired, which, of course, would mean an officer on the active list, because only officers on the active list could be retired.

When Major Leonard was retired he had less than 14 years of service on the active list to his credit, and if he had been retired after July 1, 1922, with an equal amount of service to his credit, he would have been within the third pay period carrying a salary of $2,400 for less than 14 years' service; but as that Act forbade any construction of its terms which would reduce a retired officer's pay, he continued to be paid upon the basis of $3,000 a year, which was the same as the base pay of a major of over 14 years' service. (R. 7.) When the Act of June 10, 1922, took effect, though on the retired list, he had rendered additional active service, so that if he had then been retired with credit for that service he would have been within the fourth pay period carrying a salary of $3,000 for more than 14 years and less than 23 years' service, the rate at which he has actually been paid.

At all times since the Act of 1922 took effect his service combining active and retired has exceeded

23 years, so he claims that he is entitled to have his pay based upon the fifth period, $3,500 a year for more than 23 years' service, because the Act of 1922 says that for officers "in the service" on June 30, 1922, "there shall be included in the computation all service which is now counted in computing longevity pay." The answer to that is that the provision relates solely to officers on the active list.

When Congress said that nothing contained in the Act should authorize an increase in the pay of officers on the retired list on June 30, 1922, it can not be supposed that in the next sentence but one it was providing a method for increasing the pay for those officers. To give the language any meaning it must be referred to the context where Congress was dealing with the pay of officers on the active list. When, therefore, the Act of 1926 gave petitioner the right to pay not less than that of an officer retired subsequent to 1922, the comparison must be with officers then on the active list, for only such would be eligible for retirement. An officer on the active list would have had no service on the inactive list to his credit. So petitioner should be given no credit for such service. The Court of Claims held that he was entitled to credit for all active service performed while on the inactive list. Inasmuch as the base pay under which petitioner was retired, $3,000 a year, is the same as that of a major in the fourth pay period under the Act of

1922, it makes no difference under which Act he is paid.

Chief Justice Campbell, writing for the Court of Claims (R. 10), said:

> We think there can be no doubt that the officer should be credited with all active service before and after the date of his retirement.

Citing 5 Comptroller General, 1038. Though the soundness of that conclusion may be open to doubt, nevertheless it is probably what Congress intended, for by an Act approved May 26, 1928, Public No. 551, 70th Congress, Section 17 of the Act of June 10, 1922, was further amended to make the first sentence of that section read as follows:

> That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided by this Act, *which pay shall include increases for all active duty performed since retirement in the computation of their longevity pay and pay periods.*

The italicized words are those added by the Act of May 26, 1928. This Act shows, too, that Congress intended that only active service should count.

We think the sound construction of the statute results in giving the petitioner as the basis of his retired pay the benefit of all the active service which he has performed plus the increase in longevity pay while on the retired list. That is what he has received.

The Act of 1922 is entitled "An Act to readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Service," and seems to provide a complete and comprehensive readjustment of the whole subject of the pay of the personnel of all these services. It concludes by repealing all laws and parts of laws which are inconsistent or in conflict with its provisions. The Act makes provision for longevity pay at the rate of five per cent of the base pay of the officer's period for each three years of service up to thirty years. Upon this state of the law it is doubtful if the Act of March 2, 1903, giving officers retired on account of wounds received in battle credit for service on the retired list, is still in force. The compilers of the United States Code evidently thought that it had been repealed or superceded, for they did not include it in the Code.

The portion of Section 1 of the Act of 1922, quoted *supra*, is carried into the United States Code as Section 683 of Title 10. In place of the words contained in the Act—

> For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay—

the Code substitutes—

> For officers in the service on June 30, 1922, there shall be included in the computation all active duty performed while under

appointment or enlistment from the United States Government, whether in the regular, provisional, or temporary forces.

The explanation of the annotators is that the substituted words are from Section 127 (a) added to the Act of June 3, 1916, c. 134, by the amendment thereof by Section 51 of the Act of June 4, 1920, c. 227, subchapter 1. (U. S. Code annotated, Title 10, Sec. 683.)

Major Leonard, however, has been given credit for longevity increase for inactive service, and we are not questioning it. It is mentioned merely to show that amid the complexities and complications arising out of all this legislation, both the Department and the Court of Claims have been scrupulously careful to give him the benefit of everything to which his long and meritorious service entitles him which can be justified by any reasonable construction of the statute. The conclusion reached by the Court of Claims is, in our opinion, sound. (R. 11.)

> The act of 1922 prescribes pay periods and base pay for each; also it provides longevity pay for officers in the active service. Aided by the act of May 8, 1926, it regulates the pay of retired officers, but neither act authorizes the retired officer to go from one pay period into another solely because of length of time elapsing since his retirement. The advancement from one pay period to another can be based only on active service. The base pay of the fourth pay period is the

same amount as that prescribed by the act of May 11, 1908. The plaintiff is not entitled to the base pay of the fifth pay period, and having been paid as much as an officer retired subsequent to June 30, 1922, and of equal rank and length of service would receive, the petition should be dismissed.

CONCLUSION

The complexity of these statutes makes this case very involved. If we have not succeeded in showing that the decision below is right, the petitioner has likewise failed to satisfactorily demonstrate that it is wrong. Evidently the ruling of the court below is in accord with the construction of the statutes by officials whose duty it is to apply it, and if the result is not as Congress intended, clarifying legislation may be resorted to. The case is not such as to justify consideration by this Court on certiorari.

The petition for certiorari should be denied.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
WILLIAM W. SCOTT,
Attorney.

AUGUST, 1928.

○

INDEX

	Page
Opinion below	1
Jurisdiction	1
The question	2
The statutes	2
Statement	8
Summary of argument	9
Argument	10
Conclusion	23

CITATIONS

United States v. *Tyler*, 105 U. S. 244	4, 13, 18
Act of June 30, 1882, c. 254, 22 Stat. 117, 118	3
Act of March 2, 1903, c. 975, 32 Stat. 927, 932	4
Act of May 11, 1908, c. 163, 35 Stat. 106, 108	4
Act of June 4, 1920, c. 227, 41 Stat. 759:	
Sec. 24; U. S. C. Title 10, sec. 553	18–19
Sec. 51; U. S. C. Title 10, sec. 512	19
Act of June 10, 1922, c. 212, 42 Stat. 625:	
Sec. 1; U. S. C. Title 37, secs. 1, 3, 4	4–6
Sec. 16; U. S. C. Title 37, sec. 25	6
Sec. 17; U. S. C. Title 37, sec. 26	6–7, 20
Sec. 22; U. S. C. Title 37, sec. 31	7–8
Act of May 8, 1926, c. 274, 44 Stat. 417 (U. S. C. Supp. Title 14, sec. 167a):	
Sec. 1	7–8
Sec. 2	8
Act of May 29, 1928, c. 787, 45 Stat. 774, amending sec. 17 of the Act of June 10, 1922	8
Revised Statutes:	
Sec. 1254; U. S. C. Title 10, sec. 1025	12–13
Sec. 1255; U. S. C. Title 10, sec. 1024	19
Sec. 1261	2
Sec. 1262	2
Sec. 1263	2
Sec. 1274 (U. S. C. Title 10, sec. 971)	3
Sec. 1612 (U. S. C. Title 34, sec. 971)	3
Sec. 1622 (U. S. C. Title 34, sec. 681)	3
House Report No. 857, 69th Cong., 1st sess.	17

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 183

HENRY LEONARD, PETITIONER

v.

THE UNITED STATES

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 8) is reported in 64 C. Cls. 384.

JURISDICTION

The judgment of the Court of Claims was entered on January 9, 1928. (R. 11.) A motion for a new trial was seasonably made and overruled April 2, 1928. (R. 12.) The petition for certiorari was filed on June 8, 1928 (R. 12), and the writ was granted on October 8, 1928 (R. 13). Jurisdiction to issue the writ is found in Section 3(b) of the Act of February 13, 1925.

THE QUESTION

The question presented is whether the petitioner, a major in the Marine Corps, who was retired in 1911 because of wounds received in battle, should be permitted to count, for the purpose of determining the pay period applicable in the computation of his retired pay, the years spent by him on the retired list of the Marine Corps.

THE STATUTES

The pertinent provisions of the statutes are as follows:

Section 1261, Revised Statutes:

> The officers of the Army shall be entitled to the pay herein stated after their respective designations: * * *
>
> Major: two thousand five hundred dollars a year. * * *

Section 1262, Revised Statutes:

> There shall be allowed and paid to each commissioned officer below the rank of brigadier general, * * * ten per centum of their current yearly pay for each term of five years of service.

Section 1263, Revised Statutes:

> The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law.

Section 1274, Revised Statutes (U. S. C., Title 10, Sec. 971):

> Officers retired from active service shall receive 75 per centum of the pay of the rank upon which they are retired.

Section 1612 of the Revised Statutes (U. S. C., Title 34, Sec. 971):

> The officers of the Marine Corps shall be entitled to receive the same pay and allowances * * * as are or may be provided by or in pursuance of law for the officers * * * of like grades in the infantry of the Army.

Section 1622 of the Revised Statutes (U. S. C., Title 34, Sec. 681):

> The commissioned officers of the Marine Corps shall be retired in like cases, in the same manner, and with the same relative conditions, in all respects, as are provided for officers of the Army, except as is otherwise provided in the next section.

The Act of June 30, 1882, c. 254, 22 Stat. 117, 118:

> * * * That from and after the first day of July, eighteen hundred and eighty-two, the ten per centum increase for length of service allowed to certain officers by Section twelve hundred and sixty-two of the Revised Statutes shall be computed on the yearly pay of the grade fixed by Sections twelve hun-

dred and sixty-one and twelve hundred and seventy-four of the Revised Statutes * * *.

At the October Term, 1881, this Court, in the case of *United States* v. *Tyler*, 105 U. S. 244, held that for the purposes of computing the increased service pay an officer of the Army should be permitted to count the years during which he was on the retired list.

Act of March 2, 1903, c. 975, 32 Stat. 927, 932:

> * * * That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement.

Act of May 11, 1908, c. 163, 35 Stat. 106, 108:

> That hereafter the annual pay of officers of the Army of the several grades herein mentioned shall be as follows: * * * major, three thousand dollars * * *. In no case shall * * * the pay of a major exceed four thousand dollars a year * * *.

The Act of June 10, 1922, c. 212, 42 Stat. 625 (U. S. C. Title 37, Secs. 1, 3, 4, 25, 26, 31):

> An Act To readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps,

Coast Guard, Coast and Geodetic Survey, and Public Health Service.

Be it enacted * * * That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the Regular Army and Marine Corps below the grade of brigadier general * * * pay periods are prescribed, and the base pay for each is fixed as follows:

The first period, $1,500; the second period, $2,000; the third period, $2,400; the fourth period, $3,000; the fifth period, $3,500; and the sixth period, $4,000.

* * * * *

The pay of the fifth period shall be paid to * * * majors of the Army * * * and officers of corresponding grade who have completed twenty-three years' service: * * *.

The pay of the fourth period shall be paid to * * * majors of the Army * * * and officers of corresponding grade who have completed fourteen years' service, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army, or who were appointed to the Regular Army under the provisions of the first sentence of said section 24; * * *

* * * * *

Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years:

Provided, That the base pay plus pay for length of service of no officer below the grade of colonel of the Army, captain of the Navy, or corresponding grade, shall exceed $5,750. Nothing contained in the first sentence of Section 17 or in any other section of this Act shall authorize an increase in the pay of officers or warrant officers on the retired list on June 30, 1922.

For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay * * *.

* * * * *

SEC. 16. That nothing contained in this Act shall operate to reduce the pay of any officer on the active list below the pay to which he is entitled by reason of his grade and length of service on June 30, 1922 * * *.

* * * * *

SEC. 17. That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this Act: *Provided*, That nothing contained in this Act shall operate to reduce the present pay of officers, warrant officers, and enlisted men now on the retired

list or officers or warrant officers in an equivalent status of any of the services mentioned in the title of this Act. Active duty performed after June 30, 1922, by an officer on the retired list or its equivalent shall not entitle such officer to promotion: * * * Retired officers of the Army, Navy, Marine Corps, * * * below the grade of brigadier general or commodore and retired warrant officers and enlisted men of those services, shall, when on active duty, receive full pay and allowances.

* * * * *

SEC. 22. That the provisions of this Act shall be effective beginning July 1, 1922, and all laws and parts of laws which are inconsistent herewith or in conflict with the provisions hereof are hereby repealed as of that date.

The Act of May 8, 1926, c. 274, 44 Stat. 417 (U. S. C. Supp., Title 14, Sec. 167a):

An Act to equalize the pay of retired officers of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service.

* * * That hereafter the retired pay of the officers and warrant officers of the Army, Navy, Marine Corps, * * * who were retired on or before June 30, 1922, shall not be less than that provided for the officers and warrant officers of these services of equal rank and length of service retired subsequent to that date: *Provided*, That nothing in this Act shall operate to reduce the pay of any

officer or warrant officer now on the retired list.

SEC. 2. That all Acts or parts of Acts inconsistent with this Act are hereby repealed.

The Act of May 26, 1928, c. 787, 45 Stat. 774, amended Sec. 17 of the Act of June 10, 1922, *supra*, so as to provide:

> That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this Act, *which pay shall include increases for all active duty performed since retirement in the computation of their longevity pay and pay periods.* (Italics ours.)

STATEMENT

The petitioner was retired on September 30, 1911, because of wounds received in battle. At the time of retirement he was a major with 13 years, 1 month, and 26 days' service. (R. 6.) Since retirement he has had additional active service to the extent of 4 years, 9 months, and 29 days, or a total active service before and since retirement of 17 years, 11 months, and 25 days. His total service on the active and retired lists amounts to over 27 years. From April 8, 1926, he received the pay of a major of the Marine Corps, retired, at the rate of $250 per month, less 20 cents per month hospital fund, which rate represents the maximum pay of a retired major of the Marine Corps under the Act of May 11, 1908, under which Act the pay was greater than if he had

been paid the base pay of a major of less than 14 years' service in the third pay period prescribed by the Act of June 10, 1922, and is the same as the base pay prescribed by said Act for a major of the Marine Corps of more than 14 years' service in the fourth pay period. Petitioner also received longevity pay as a major of 27 years' service. If paid as a major entitled to base pay for 27 years' active service, he would receive the pay of the fifth period, or a difference for the time involved in this suit of the sum of $723.41. (R. 7.)

The Court of Claims held that for the purpose of computing his base pay as a retired officer petitioner was not entitled to count the years spent on the retired list. (R. 8 to 11.)

SUMMARY OF ARGUMENT

A careful examination of the many statutory provisions which must be taken into account leads to the conclusion that Congress intended to give to the petitioner, as the basis of his retired pay, the benefit of all active service which he has performed, and, in addition, such increase by way of longevity pay as accrued while he was on the retired list. That is what he has received. The statutory provisions do not warrant the inference that Congress intended to give him the same pay as that of an officer of equal rank and length of service, all of which had been on the active list.

ARGUMENT

At the time of retirement of petitioner the Act of May 11, 1908, fixing the base pay of a major at $3,000 per year, was in effect. Petitioner was therefore paid prior to the Act of June 10, 1922, a sum computed upon $3,000 as his base pay. This base pay provided by the Act of May 11, 1908, depended entirely upon rank and was in no manner affected by length of service. Petitioner has also received the longevity pay provided for by the appropriate statutes existing at the time of the various payments. There is no question here raised as to the correctness of the amount paid petitioner for longevity pay. The sole question is as to the proper base pay.

By the Act of June 10, 1922, the base pay of officers was made to depend upon both rank and length of service. A major of less than 14 years' service was to receive the base pay of the third period, which was $2,400 per year. A major of over 14 years' service was to receive the base pay of the fourth period, which was $3,000 per year, and a major of over 23 years' service was to receive the base pay of the fifth period, which was $3,500 per year.

At the time of retirement petitioner had active service of 13 years and 1 month. If this status controlled under the Act of June 10, 1922, he should have received the base pay of the third period of $2,400 per year. Since retirement petitioner has

had active duty to the extent of 4 years and 9 months, making a total active duty, both before and since retirement, of 17 years and 11 months. If this status is to control under the Act of June 10, 1922, he should have received the base pay of the fourth period, $3,000 per year. Petitioner, up to August 3, 1925, had a total service both active and retired of 27 years. If all of this time is to be counted under the Act of June 10, 1922, in determining the base pay, he should have received the base pay of the fifth period which is $3,500 per year.

There may be considerable question as to whether under the Act of June 10, 1922, active duty performed on detail since retirement may be counted in computing the base pay period, and, therefore, whether the proper period for petitioner is the third or fourth period but it is not necessary to decide this question. The base pay of the third period is $2,400 per year and that of the fourth period is $3,000 per year. If all of such active duty is counted, petitioner would be in the fourth period at $3,000 per year. At the time of the Act of June 10, 1922, he was receiving a base pay under the Act of May 11, 1908, of $3,000 per year.

The Act of June 10, 1922, provided that such act should not reduce the pay of any retired officer. Further than this, any doubt as to time on detail to active service since retirement is probably ended by the Act of May 26, 1928, which provided that after July 1, 1922, retired officers should have their

retired pay computed as authorized by law, which pay should include increases for all active duty performed since retirement in the computation of their longevity pay and pay periods, and the Government did not contest in the court below the legality of payment to petitioner calculated upon a base pay at the rate of $3,000 per year.

This leaves as the sole question in this case the determination as to whether petitioner should receive the base pay of the fourth or fifth period. Considering his total active and retired service, petitioner has had a service of over 27 years, and if he can count the same for the purposes of the determination of his pay period, he would receive the pay of the fifth period, being a major of over 23 years' service. If, however, he is to be permitted to count only the active service for the purpose of determining his pay period, then his base pay cannot exceed the sum of $3,000 per year, which is the base pay of the fourth period.

Section 1261 of the Revised Statutes provided a scale of pay for officers of the Army dependent upon rank regardless of the length of service. Section 1262 provided for a longevity pay based upon length of service, such pay being a 10 per cent addition to the yearly pay of the officer for each five years of service. Section 1274 of the Revised Statutes provided that retired officers should receive 75 per cent of the pay "of the rank upon which they are retired." Section 1254 of the

Revised Statutes (U. S. C. Title 10, Sec. 1025) provided that retired officers should be retired " upon the actual rank held by them at the date of retirement."

In 1881 this Court in the case of *United States* v. *Tyler*, 105 U. S. 244, determined that for the purposes of computing the longevity pay, provided for by Section 1262 of the Revised Statutes, retired officers should be permitted to count the service spent both on the active and retired lists.

The Act of March 2, 1903, changed the law so as to provide that only officers retired on account of wounds received in battle would be permitted to count both retired and active service in the computation of their longevity pay. By the Act of May 11, 1908, a new scale of base pay for officers was provided. This scale was also dependent upon rank regardless of any consideration for the length of service. Petitioner was retired in 1911 when this statute was in force and the law continued without change until by the Act of June 10, 1922, a new schedule of both base and longevity pay was provided for the officers of the Army, Navy, and Marine Corps. This statute provided for pay periods in the determination of the base pay, and made the question whether the officer should receive the pay of a certain period depend upon both the rank and the length of service of the officer.

Under this Act the base pay of the fifth period, amounting to $3,500 per year, was to be paid to majors of the Army of 23 years' service, and the base

pay of the fourth period, amounting to $3,000, was to be paid to majors of the Army of 14 years of service. But, if at that time there had been a question as to whether petitioner should have received 75 per cent of the base pay of the fourth or fifth period, that question was for the time being set at rest by the provisions of Section 1 of the Act to the effect that "nothing contained in the first sentence of Section 17 or in any other section of this Act shall authorize an increase in the pay of officers or warrant officers on the retired list on June 30, 1922." In view of this provision of the law petitioner continued to receive as base pay 75 per cent (in accordance with Section 1274, Revised Statutes) of $3,000, the pay of a major (as provided in the Act of May 11, 1908), which was the situation in effect both at the time of retirement of the petitioner and immediately prior to the enactment of the Act of June 10, 1922.

This condition remained unchanged until by the Act of May 8, 1926, it was provided that thereafter the retired pay of officers retired on or before June 30, 1922 "shall not be less than that provided for the officers and warrant officers of these services of equal rank and length of service retired subsequent to that date; * * *."

Petitioner contends that after the enactment of this statute he is entitled to count both his active and retired service in the determination of his base pay period. This contention results from the fol-

lowing combination of statutes. By the Act of March 2, 1903, the petitioner, an officer retired on account of wounds received in battle, may count both active and retired service for the purposes of computation of his longevity pay. By the Act of May 8, 1926, it is provided that officers who were retired on or before June 30, 1922 (petitioner is such an officer) shall receive the same pay as officers of equal rank and length of service retired subsequent to that date. By the Act of June 10, 1922, it was provided that for officers in the service on June 30, 1922, there should be included in the computation for purposes of pay all service which was then counted in computing longevity pay. Petitioner therefore contends that he should be permitted to count service, both active and retired, which would make over 27 years of service and entitle him to 75 per cent of the pay of the fifth period.

The Government contended in the Court of Claims that the provisions of the Act of June 10, 1922, to the effect that all service may be counted which is now counted in computing longevity pay applies only to officers on the active list at that time and can have no effect upon the determination of the pay period of officers who were then on the retired list.

The Act of May 8, 1926, provides that thereafter the retired pay of officers who were retired on or before June 30, 1922, shall be not less than that

provided for officers of equal rank and length of service who were retired subsequent to that date. In other words, the officer retired before such date may receive the same or more pay, but he should not receive less than the officer retired after said date. We should, therefore, determine what is the highest pay of an officer who has equal rank and length of service with petitioner, and who was retired after June 30, 1922. In deciding this question we must consider whether the rank and length of service existing *at the date of retirement* is controlling. Should we consider only the length of service accrued at the date of petitioner's retirement, we have only thirteen years of active service, which would result in petitioner being entitled to receive the pay of the third period. The Government argued in the court below that only the active service could be counted. In support of this contention it was urged, as is pointed out by the Court of Claims in its opinion, speaking of the Act of June 10, 1922 (R. 10, 11), that—

> the provision to be found in Section 1 of the Act, 42 Stat. 627, that "For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay" does not refer to or include officers on the retired list. It has reference to officers on the active list. Clearly, when Congress says that nothing contained in the act shall authorize an increase in the pay of officers on the re-

> tired list, on June 30, 1922, it can not be supposed that in the next sentence, save one, the Congress was providing a method whereby there would be an increase in the pay of these same officers. To give the quoted language any meaning it must be referred to its context, where the act is dealing with pay of officers in the active service.

It seems clear that these provisions of the Act of June 10, 1922, were intended to deal only with the pay of officers on the active list, and Congress did not intend by that Act to increase the pay of retired officers. The Act expressly provides that there shall be no such increase. The Act of May 8, 1926, did intend to increase the pay of retired officers. Its purpose is clearly shown by the report of the House Committee on Military Affairs (House Report No. 857, 69th Congress, First Session). The report, referring to Sec. 1274 of the Revised Statutes, says:

> From this it will be noted that the pay of retired officers is not a fixed sum nor is it a specified sum, but it is 75 per cent of the pay of the rank upon which they are retired; that is, three-fourths of the pay of officers of similar rank still on the active list and not three-fourths of the pay at the date of retirement.

While this Act did intend to increase the pay of retired officers, there is nothing to show that it was intended to permit the counting of retired time in

the computation of the pay period. It is only fair to assume that the Act had in mind the normal case of officers retired from active service, and conceived as a comparative the usual case of an officer retired after active service with no retired service to his credit prior to the time of retirement. That this is probably what Congress had in mind is borne out by the fact, as pointed out above, that the Act of June 10, 1922, in providing for the counting of the same time in computing the base pay period as is counted in the computation of longevity pay, referred to officers on the active list; and by the further fact, that by the Act of March 2, 1903, Congress had changed the general rule created by the decision of this Court in the case of *United States* v. *Tyler*, 105 U. S. 244, and had limited those who could count retired time for longevity pay purposes to the very small class of those who had been retired for wounds received in battle.

In further support of the theory that the Act of May 8, 1926, contemplated only the case of ordinary retirement, it may be said that under the law as it stood at the date of said Act, an officer on the active list who had been previously retired presented a very unusual situation. The Act of June 4, 1920, (c. 227, 41 Stat. 759) contained a complete plan for the organization of the Army, definitely fixing commissioned strength in each grade. By Section 24 of said Act, including the subsections thereof (c.

227, 41 Stat. 759, 771; U. S. C. Title 10, Sec. 553), a method was provided for filling vacancies in the various commissioned grades in the Army. A promotion list was created, and in substance it was provided that vacancies in each grade should be filled only by promotion of officers on the promotion list. Prior to promulgation of the promotion list under the Act of June 4, 1920, it was possible for an officer who had been retired to be reappointed and recommissioned in the active service when a vacancy in the rank of his reappointment existed, and it was found that he was physically fit to perform military duty. But thereafter this could not be done in the absence of a special Act by Congress, since, under said Act of 1920, vacancies in the rank of major had to be filled from the captains at the top of the promotion list. Section 1255 of the Revised Statutes (U. S. C. Title 10, Sec. 1024) provided that—

> Officers retired from active service shall be withdrawn from command and from the line of promotion.

Sec. 51 of the Act of June 4, 1920 (c. 227, 41 Stat. 759, 785 (U. S. C. Title 10, Sec. 512)), provided that—

> In determining relative rank and increase of pay for length of service, and, in the case of officers of the regular army, in determining rights of retirement, active duty performed while under appointment from the United States Government * * * shall be credited to the same extent as service under a regular army commission.

By the Act of June 10, 1922, Sec. 17, it was provided that—

> Active duty performed after June 30, 1922, by an officer on the retired list or its equivalent shall not entitle such officer to promotion.

It thus seems apparent that at the time of the passage of the Act of June 10, 1922, as well as the Act of May 8, 1926, the normal case of a retired officer was one who had been retired at the end of a term of active service, with no prior retired service to his credit, and that, as a practical matter, under the then existing laws, no retired officer could be reappointed and recommissioned in his prior rank in the absence of a special Act by Congress. It is, therefore, believed that it is fair to say that Congress did not intend, by the Act of May 8, 1926, to permit retired officers to count their retired time for the purpose of computing their base-pay period.

The term "promotion" has usually been considered to mean a change in grade, such as a promotion from captain to major. This meaning was conceived prior to the time of the creation of different pay periods for the same rank, and when the base pay was dependent entirely upon rank, and before the base pay depended upon both rank and length of service. Now an officer of a given rank may be advanced to another base-pay period in the same rank, which entitles him to receive the same base pay as an officer of one of the lower-pay periods of a higher rank. This is a substitute for a promotion

in rank. In fact, it seems clear that the purpose of the creation of the pay periods, and the change of the plan of pay of officers of the Army, which was brought about by the Act of June 10, 1922, was to permit of a promotion of this kind where the old form of promotion was slow, irregular, and unjust.

Therefore it may be said that the advancement from one pay period to another is in effect, if not in fact, a promotion. Congress, by the legislation which we have discussed, has clearly shown an intent not to permit retired time to result in promotions, and has even prohibited officers on the retired list from receiving a promotion as a result of active duty performed on detail while on the retired list.

A further indication of the intent of Congress in such matters, showing that retired time should not be counted in the computation of the base pay of officers on the retired list, is found in the Act of May 26, 1928, where Congress provided that in computing the pay period of retired officers, "all active duty performed since retirement" shall be included.

Let us set up a comparative officer for the purpose of determining the base pay period of petitioner, an officer who has the same rank and length of service as petitioner and who was retired after June 30, 1922. He would have had on date of retirement after June 30, 1922, because of wounds received in battle, a service on the active list of 13 years and 1 month. After retirement he would have had active duty of 4 years and 9 months by detail while on the retired list, and then let us assume

he has been on the retired list 14 years since the date of retirement. This is the only true and exact parallel of petitioner. No other hypothesis would be a true or correct comparative, since it would have to assume a reappointment to active service, which is not the case with the service of petitioner. And, further than this, it would be impossible for any officer to have had 14 years' retired service between the date of petitioner's retirement in 1911 and a reappointment to the active list prior to the promulgation of the promotion list under the Act of June 4, 1920, after which there could be no reappointment to the grade of major.

The true comparative above described, having a service on the active list of less than 14 years, would, *on retirement*, have received the base pay of a major of the third period of $2,400 per year under the Act of June 10, 1922. When, after retirement, he had performed active duty on detail of 4 years and 9 months, he would have passed to the pay of the fourth period, since, under the Act of May 26, 1928, he could count this active duty to increase his pay. This would result in over 14 years' active service, but less than 23 years, giving him a base pay of $3,000 per year, which is the sum that petitioner received. He could not advance to the fifth pay period when his retired time added to active service exceeded 23 years, as this would be in effect a promotion, and, as above pointed out, is prohibited by Section 17 of the Act of June 10, 1922, and is not authorized by the Act of May 26, 1928. In fact,

the Act of May 26, 1928, by permitting the counting of active duty since retirement for the purpose of changing the pay period, clearly shows the intent of Congress that all other time on the retired list should be excluded in computation of the pay period.

Thus the true comparative, retired after June 30, 1922, of equal rank and length of service with petitioner, would be in the fourth pay period which was the rate of base pay received by petitioner. Therefore petitioner has received all to which he is entitled under the Act of May 8, 1926, which provides that the pay of officers retired on or before June 30, 1922, should not be less than that of officers of equal rank and length of service retired subsequent to said date.

CONCLUSION

While petitioner is of a class that deserves every consideration, yet it is believed he has received all to which he is entitled under existing laws, and that the decision of the Court of Claims is in accord with the law and the intent of Congress. It is, therefore, respectfully submitted that the judgment of the Court of Claims should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

JANUARY, 1929.